Sulaiman bin Abdul Kadir v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS M-05(SH)-505–11 OF 2017, M-05(SH)-506–11 OF 2017 AND M-05(SH)-507–11 OF 2017

KAMARDIN HASHIM, MOHAMAD ZABIDIN AND YEW JEN KIE JJCA

18 NOVEMBER 2019

Evidence — Circumstantial evidence — Conclusion from facts — Appellants were found guilty of acting in concert to kidnap man for ransom — Whether all pieces of circumstantial evidence taken together led to irresistible conclusion that appellants were guilty as charged — Whether defences raised by appellants were mere denials and failed to raise reasonable doubt in prosecution's case — Whether prosecution had proven its case beyond reasonable doubt — Whether sentence imposed on appellants should not be disturbed as reasons given by trial judge for imposing same were reasonable

The three appellants herein were charged together with two others with kidnapping a man ('Tan') for ransom, an offence punishable under s 3(1) of the Kidnapping Act 1961. At the end of the prosecution's case, the High Court acquitted all the accused without calling for their defence. On the prosecution's appeal, the Court of Appeal ('COA') ordered the defence to be called against the three appellants herein. After hearing their defence, the trial judge found all three appellants guilty and sentenced them to life imprisonment and ten strokes of the rotan. The instant appeals against the conviction and sentence only concerned the first and second appellants ('Sulaiman' and 'Kamaruzaman') as the third appellant ('Farezzuwan') withdrew his appeal on the day of hearing. The evidence against the appellants at trial was circumstantial. Tan was walking to his car after work one evening when several men grabbed him from behind and shoved him into the rear of a van. His hands and legs were tied up and his eyes and mouth covered with cellophane tape. Tan was taken to a house-turned-homestay and locked up in the toilet after the kidnappers had obtained from him his brother's contact number for the purpose of demanding ransom for his release. Tan's constant screams for help attracted the attention of outsiders and he was eventually found the following morning and released. Police investigating the incident spotted Sulaiman and Kamaruzaman sitting in a parked car near the homestay. When the police approached them, they attempted to run but were caught and arrested. A cellphone with two sim cards and a key and remote alarm belonging to the homestay were seized from Kamaruzaman. The owner of the homestay, PW12, confirmed that Sulaiman had rented the homestay from her using an

identity card belonging to a Mohd Elias who had reported it lost. Sulaiman led police to a house where a wallet containing Tan's personal documents was recovered. Personal documents belonging to Mohd Elias were also recovered from the house. Police later discovered that Kamaruzaman had rented the van used by the kidnappers and that his fingerprints were found in the room where Tan was confined. Analysis of the sim cards in the phone seized from Kamaruzaman revealed that they were used to call, among others, PW12 (with regard to renting the homestay) and Tan's brother (for ransom of RM500,000 to secure Tan's release). Against this backdrop of the prosecution's evidence, Sulaiman's defence was that he was at home with his mother (since deceased) the whole of the day when the kidnapping happened. He said the following day, he met Kamaruzaman at a restaurant and they decided to go fishing. He said after they had reached a suitable spot to do fishing, Kamaruzaman happened to find from the area a plastic bag containing two cellphone sim cards which Kamaruzaman inserted into his cellphone. At that juncture, they were suddenly surrounded by police personnel and arrested. Kamaruzaman's defence was similar to Sulaiman's narrative except that he said that before he met Sulaiman for the fishing outing, he went to the homestay to see what was going on as many people had gathered there. The trial judge found that the defence of both appellants failed to raise a reasonable doubt in the prosecution's case and ruled that the prosecution had proven its case beyond reasonable doubt. In their instant appeals, the appellants contended that there was no evidence to link them to Tan's kidnapping. Since a previous panel of the COA had already found that the prosecution had proven a prima facie case against the appellants and had ordered their defence to be called, the instant appeals were only concerned with whether the trial judge was right in finding that the defences of the appellants failed to raise a reasonable doubt in the prosecution's case and whether the prosecution had proven its case against them beyond reasonable doubt.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) The convictions were safe and amply supported by strong circumstantial evidence which when taken together led to only one irresistible conclusion — that there was common intention amongst the appellants to commit the offence as charged. The appellants had participated in concert pursuant to a pre-arranged plan to commit the intended offence. The defence of both the appellants was a mere denial which did not cast any reasonable doubt in the prosecution's case. The prosecution had proven its case against the appellants beyond reasonable doubt (see paras 32–33).

(2) There was no necessity to interfere with the sentence imposed by the trial judge as it was reasonable based on the reasons given by the judge, ie, that no serious injuries were inflicted on the victim, the length of time he was confined was short, no ransom money was paid to the kidnappers and

A that apart from the degree of deliberateness in the commission of the offence, the court had considered the mitigating factors and that public interest would be best served by allowing the appellants an opportunity to lead an honest life after serving their sentences (see para 34).

B **[Bahasa Malaysia summary**

Ketiga-tiga perayu didakwa bersama dua orang lain dengan menculik seorang lelaki ('Tan') untuk tebusan, satu kesalahan yang boleh dihukum di bawah s 3(1) Akta Penculikan 1961. Pada akhir kes pendakwaan, Mahkamah Tinggi membebaskan semua tertuduh tanpa mengarahkan pembelaan mereka. C Mengenai rayuan pihak pendakwaan, Mahkamah Rayuan ('MR') mengarahkan pembelaan terhadap ketiga-tiga perayu. Selepas mendengar pembelaan mereka, hakim bicara mendapati ketiga-tiga perayu bersalah dan dijatuhkan hukuman penjara seumur hidup dan sepuluh sebatan rotan. Rayuan ini terhadap sabitan dan hukuman hanya memberi perhatian kepada D perayu pertama dan kedua ('Sulaiman' dan 'Kamaruzaman') manakala perayu ketiga ('Farezzuwan') menarik balik rayuannya pada hari pendengaran. Keterangan terhadap perayu yang dibicarakan adalah mengikut keadaan. Tan berjalan ke keretanya selepas bekerja pada suatu malam ketika beberapa lelaki menangkapnya dari belakang dan membawanya ke belakang van. Tangan dan E kakinya diikat dan mata dan mulutnya ditutup dengan pita selofan. Tan dibawa ke rumah tumpangan dan dikurung di dalam tandas selepas penculik telah mendapatkan daripadanya nombor telefon abangnya untuk tujuan menuntut tebusan untuk pembebasannya. Jeritan berterusan Tan membantu menarik perhatian orang luar dan akhirnya dia dijumpai pada waktu pagi dan F dibebaskan. Polis yang menyiasat insiden itu melihat Sulaiman dan Kamaruzaman duduk di sebuah kereta terparkir berhampiran rumah tumpangan. Apabila polis menghampiri mereka, mereka cuba melarikan diri tetapi ditangkap dan ditahan. Sebuah telefon bimbit dengan dua kad sim dan penggera jauh milik homestay telah dirampas daripada Kamaruzaman. Pemilik G homestay, PW12, mengesahkan bahawa Sulaiman telah menyewa rumah tumpangan daripadanya menggunakan kad pengenalan milik Mohd Elias yang telah melaporkannya hilang. Sulaiman membawa polis ke sebuah rumah di mana dompet yang mengandungi dokumen peribadi Tan telah ditemui. Dokumen peribadi milik Mohd Elias juga ditemui dari rumah itu. Polis H kemudian mendapati bahawa Kamaruzaman telah menyewa van yang digunakan oleh penculik dan bahawa cap jarinya ditemui di dalam bilik di mana Tan terkurung. Analisis kad sim dalam telefon yang dirampas daripada Kamaruzaman mendedahkan bahawa mereka pernah memanggil, antara lain, PW12 (berkaitan dengan menyewa rumah tumpangan) dan abang Tan (untuk I tebusan RM500,000 untuk mendapatkan pembebasan Tan). Berdasarkan keterangan pendakwaan ini, pembelaan Sulaiman adalah bahawa dia berada di rumah dengan ibunya (sejak mati) sepanjang hari ketika penculikan itu berlaku. Katanya pada keesokan harinya, dia bertemu Kamaruzaman di sebuah restoran dan mereka memutuskan untuk pergi memancing. Katanya setelah

tiba di tempat yang sesuai untuk memancing, Kamaruzaman menemui dari kawasan itu beg plastik mengandungi dua kad sim telefon bimbit yang mana dimasukkan oleh Kamaruzaman ke dalam telefon bimbitnya. Pada masa itu, mereka tiba-tiba dikelilingi oleh anggota polis dan ditangkap. Pembelaan Kamaruzaman sama dengan naratif Sulaiman kecuali bahawa dia berkata sebelum dia bertemu dengan Sulaiman untuk memancing, dia pergi ke homestay untuk melihat apa yang berlaku ketika ramai orang berkumpul di sana. Hakim bicara mendapati bahawa pembelaan kedua-dua perayu gagal menimbulkan keraguan yang munasabah dalam kes pendakwaan dan memutuskan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Dalam rayuan mereka ini, perayu menegaskan bahawa tidak ada bukti untuk menghubungkan mereka dengan penculikan Tan. Memandangkan panel MR sebelum ini telah mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan telah mengarahkan pembelaan mereka dipanggil, rayuan ini hanya berkenaan dengan sama ada hakim bicara adalah betul dalam mendapati bahawa pembelaan perayu gagal menimbulkan keraguan munasabah dalam kes pendakwaan dan sama ada pendakwaan telah membuktikan kesnya terhadap mereka melampaui keraguan munasabah.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Sabitan adalah selamat dan banyak disokong oleh keterangan mengikut keadaan yang kuat yang apabila diambil bersama membawa kepada satu kesimpulan yang tidak dapat dinafikan — bahawa terdapat hasrat bersama di antara perayu untuk melakukan kesalahan itu seperti yang didakwa. Perayu telah mengambil bahagian bersama menurut pelan diatur untuk melakukan kesalahan yang dimaksudkan. Pembelaan kedua-dua perayu hanyalah penafian semata-mata yang tidak menimbulkan keraguan munasabah dalam kes pendakwaan. Pihak pendakwaan telah membuktikan kesnya terhadap perayu melampaui keraguan munasabah (lihat perenggan 32–33).

(2) Tidak ada keperluan untuk mengganggu hukuman yang dikenakan oleh hakim bicara kerana adalah munasabah berdasarkan alasan yang diberikan oleh hakim, iaitu, tidak ada kecederaan yang serius yang ditimbulkan pada mangsa, tempoh masa dia dikurung adalah pendek, tidak ada wang tebusan telah dibayar kepada penculik dan bahawa selain daripada darjah kesengajaan dan pelakuan kesalahan itu, mahkamah telah mempertimbangkan faktor-faktor mitigasi dan kepentingan awam akan disampaikan dengan sebaiknya dengan membenarkan perayu peluang untuk menjalani kehidupan yang jujur selepas menjalani hukuman mereka (lihat perenggan 34).]

Cases referred to

Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383, CA (refd)

Legislation referred to

Kidnapping Act 1961 s 3(1)

Appeal from: Criminal Trial No 46–1–06 of 2011 (High Court, Malacca)

Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Zabidin JCA (delivering judgment of the court):

[1] The three appellants together with Murukesan a/l Sivaperumal ('the fourth accused') and Robin ak Ajing ('the fifth accused') were charged and tried in the High Court Malacca for kidnapping a man named Tan Tiang See ('PW21') for ransom, an offence punishable under s 3(1) of the Kidnapping Act 1961 ('the Act').

[2] The charge against them read as follows:

> Bahawa kamu bersama-sama pada 14.2.2011 jam lebih kurang 6.00 petang di hadapan Gudang K&H Trading Sdn Bhd, No 1 Jalan TTC 25, Cheng Industrial Estate, di dalam Daerah Melaka Tengah, dalam Negeri Melaka telah dengan niat hendak membuat tebusan mencolek seorang lelaki cina bernama TAN TIANG SEE, K/P: 710314-04-5217 yang berumur 39 tahun serta mengurung lelaki tersebut dengan salah di sebuah rumah beralamat No 48, Jalan Cengal 1, Taman Merdeka, Batu Berendam, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka sehingga wang tebusan sebanyak RM500,000.00 dibayar oleh abang mangsa iaitu TAN THEAN LEE, K/P: 620807-10-5979. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 3(1) Akta Colek 1961 (AKTA 365) dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

[3] At the end of the prosecution's case, the learned trial judge acquitted all of them without calling for their defence. Aggrieved by the said order, the public prosecutor appealed to this court. On 2 February 2017 this court allowed the prosecution's appeal and ordered defence to be called against all the three appellants.

[4] After hearing the defence, the learned trial judge found all three including the second appellant guilty of the charge and sentenced them to life imprisonment. All three including the second appellant filed separate appeals to this court against their convictions and sentences and their cases were registered with three different case numbers. The appeal by the first appellant was registered as M-05(SH)-505–11 of 2017. The appeal by the second appellant was registered as M-05 (SH)-506–11 of 2017 and the appeal by the

third appellant M-05(SH)-507–11 of 2017. All three appeals were scheduled to be heard together.

[5] On 23 April 2019, when the appeals were called up for hearing, the third appellant informed the court that he was withdrawing his appeal. Hence, his appeal was struck out and the conviction and sentence on the third appellant imposed by the learned trial judge was affirmed.

[6] We continued to hear the appeals by the first and second appellants. After hearing their submissions and that of the learned deputy public prosecutor's ('DPP') we dismissed both appeals.

[7] Not satisfied with our decision, the second appellant lodged a notice of appeal to the Federal Court dated 29 April 2019. The first appellant did not file any notice of appeal against our decision.

[8] We, now give our reason for dismissing the appeal by both the appellants.

THE PROSECUTION'S CASE

[9] The evidence proffered by the prosecution is circumstantial in nature. The relevant part of the evidence may be summarised as follows.

(a) from PW21 it was established that on 14 February 2011 at about 6pm, once PW21 exited from the main door of K&H Trading Sdn Bhd warehouse (company of PW21's brother where he was working) located at No 1 Jalan TTC 25, Cheng Industrial Estate, Melaka ('K&H Warehouse'), he saw a van parked at the left side of the main door of K&H Warehouse;

(b) there were signboard of 'AWAS' and cones beside the van. PW21 further saw around seven to eight men working to remove or clear away bushy clump of grass in front of the said K&H Warehouse;

(c) PW 21 moved towards the direction where his car was parked. He then realised four to five people approaching him. When he glanced back, he saw an Indian man (whom he identified as fourth accused) who punched him in the face. Then, the said four to five people grabbed PW21 from his back and pushed him into the rear of the van. His hands and legs were tied. Meanwhile, his eyes and mouth were covered with cellophane tape;

(d) the van started to move. After the van travelled for about 20 minutes, PW21 felt the van stopped and he heard the sounds of the van door and gate of a premise opening.

(e) PW21 was carried by some people (kidnappers) and then left on the floor where he felt there was a hole. After about one hour, PW21 successfully

untied his legs. However, the kidnappers realised this and brought him to another spot and spoke to him. PW21 was told by one of the kidnappers that they did not intend to kill PW21, as the next day would be Awal Muharam;

(f) one of the kidnappers asked PW21 for anyone that could be contacted for his release. PW21 gave his brothers (Tan Tien Lee, 'PW22') handphone number ie 019-6677895 to the kidnapper;

(g) after giving the hand phone number of PW22, the kidnappers took PW21's gold ring and tied PW21's legs again. This time, they tightened the tie. Not only that, the kidnappers also checked PW21's trousers pocket and took his wallet which contained at least RM1,000, Nokia handphone 5800 and a lighter;

(h) thereafter, PW21 was brought back and placed at the original spot where there was a hole. PW21 was instructed to be silent. After ensuring there was no one present in the premise, PW21 said he screamed for help every 30 minutes. After quite some time, PW21 heard the sounds of opening gate and he initially thought that the kidnappers had returned. To his surprise, he heard a conversation between two ladies asking to each other whether he was a male or a female;

(i) immediately, PW21 took the opportunity to reply that he is a male and asked for their help;

(j) PW21 then heard the reply by a man ('PW32') that he could not fully open the door of the toilet. PW32 asked PW21 to be patient and to wait for the arrival of the police. Shortly, the police arrived at the scene. PW32 and KPL Kamaruddin bin Baba ('PW8') together carried PW21 to a chair and untied PW21;

(k) PW21 borrowed a cell phone from a chinese police officer that was present to contact his brother and his wife. After about ten minutes, PW21's wife arrived at the scene. Later, PW21 was sent to Hospital Besar Melaka accompanied by his wife. At that time, PW21 realised that he was in fact confined at Taman Merdeka nearby his house; and

(l) as a result of the incident, PW21 was injured on his right hand, mouth and forehead.

[10] The evidence of PW22, the brother of PW21 was that:

(a) on 14 February 2011 at about 11.30pm, he received a phone call from number 013-6842005 made by a male Malay informing him that SP21 was in their custody and asked for RM500,000 ransom. After some negotiation the amount was reduced to RM300,000 to be paid the next day; and

(b) on 15 February 2011 at about 8.15am, SP22 received another call from the same person (SP22 recognised the voice to be the same as the previous caller) but this time using the phone number 017-787839 asking about the ransom money. At about 9.20am, the same caller again called SP22 using phone number 017-3543499. SP22 did not answer the call. At about 11am, the same caller again called PW22 using the same phone number 017-3543499.

[11] The other evidence from the other prosecution's witness is that:

(a) on 14 February 2011, Mohd Azrul bin Abu Hassan ('PW32'), son of the owner of a house turned into homestay accommodation service, received a phone call from No 017-3543499 for accommodation. A Malay man was at the other end. He then gave the man his mother's hand phone number ie 013-6910350 for the man to directly deal with his mother. PW32 informed his mother Sofiah bt Yang Razali ('PW12') about this matter;

(b) PW12 went to the said house at No 48, Jalan Chenggal 1, Taman Merdeka, Batu Berendam, Melaka ('homestay') with her friend to clean the place before renting to others;

(c) two men appeared at the homestay on 14 February 2011 at around 2pm and one of them told PW12 that he had made the call to rent the homestay. He gave photostatted copy of identification card ('IC') and driving licence ('P39A') to PW12 and asked PW12 to enter into her record of renting the homestay based on the name as stated on the said IC;

(d) PW12 was able to identify the first appellant as the man who gave her the copy of P39A. After she received payment of RM140 from him, PW12 passed the key ('P43') to the first appellant. On that night, PW12 received a call from someone using No 017-3543499 asking to continue renting the homestay for one more night;

(e) on 15 February 2011, PW12 answered a call from the neighbour of the homestay and she was told that the neighbour heard voices of someone asking for help coming from the homestay. PW12 and PW32 decided to go to their homestay to find out what actually happened;

(f) when they reached the homestay at around 8am that morning, they saw many people were gathering and standing in front of the homestay. They also heard clearly the voices of someone asking for help. PW32 climbed over the gate and unlocked the padlock. Then, he entered the homestay through unlocked sliding door and looked for the source of the voice. Finally, he found PW21 inside a toilet. It was PW32's testimony that he noticed that PW21's head was bandaged with blue cellophane tape

(P29A). Hands were tied with black cable ties (P28A) and legs were tied with orange nylon rope (P27A); and

(g) on 15 February 2011 at around 11.30am, Insp Stephen a/l Ayuk ('PW15') led a team of special criminal investigation division ('D9') to the homestay. Upon arrival at the homestay, he noticed and felt very suspicious of two Malay men who were inside a parked blue Satria car with plate registration No CBA 848. PW15 restrained the Satria car and introduced himself as a policeman by showing his authority card. These two suspects who were the first and second appellants, attempted to flee from the scene. There was a scuffle between the D9 team and the two appellants. Nevertheless, both the first and second appellants were successfully arrested.

[12] PW15, the investigating officer testified, among others, that:

(a) a phone with dual sim cards were seized from the second appellant and was sent to Maxis for analysis. It was confirmed by PW39 that the two sim cards are for numbers 017-7878739 and 017-3543499; and

(b) a key and remote alarm belonging to the homestay was recovered from the second appellant and according to PW12, he handed this key and remote alarm to the first appellant. It was the first appellant who rented the homestay using an identity card belonging to one Mohd Elias ('PW9') that was reported lost on 22 January 2011.

[13] The telecommunication service provider Maxis, through PW38 confirmed that there were calls from 017-7878739 to PW12 (the owner of homestay) and PW22 (the victim's brother). There were calls from 017-3543499 to PW12, PW 32 (the son of the owner of the homestay) and PW22. Calls were also made to telephone number 012-3107320 which was registered in the first appellant's name and was recovered from him at the time of his arrest. Calls were also made from this number to the second appellant.

[14] It was the second appellant who rented the motor van WFX 6533 that was used by the kidnappers on the day PW21 was kidnapped.

[15] The DNA evidence showed that the first appellant's and the second appellant's DNA material were found on the none No 13. The second appellant's fingerprints were also found in the room where the victim was confined.

[16] PW35 testified that the first appellant led PW35 to a house where a wallet containing personal documents of PW21 (exhs P110–P110H) were

recovered. Other documents recovered from the same house were documents belonging to Mohd Elias ('PW9'). A

[17] Above were the circumstantial evidence proffered by the prosecution to establish a prima farcie case against the appellants. As alluded to earlier, at the end of the prosecution case, the learned trial judge acquitted the appellants without their defence being called. But on appeal, this vourt via an order dated 2 February 2017 ruled that the prosecution had established a prima facie case against the appellants. B

THE DEFENCE C

[18] Both appellants elected to testify under oath. The first appellant alleged that, on 14 February 2011 he was in the house with his mother (deceased) and did not go anywhere. On the next day at around 10am, he went to a restaurant at Taman Merdeka to meet the second appellant whom he had planned to go fishing with. He claimed that he did not have the second appellant's hand phone number because they had just knew each other since 10 January 2011. He waited until the arrival of the second appellant, and they departed to the fishing spot after having some food. D E

[19] The first appellant drove the second appellant to a spot and asked the second appellant where he wanted to fish. They then decided to stop at a suitable spot and parked the car under a tree. The second appellant said, he wanted to go down from the car to look whether the place was suitable or not. After that, the second appellant brought back one red plastic bag to the car and whilst sitting at the front passenger seat with one leg outside, the second appellant opened the plastic bag. The first appellant saw the second appellant took the key and opened his hand phone to insert the sim card found from the plastic bag. Suddenly, there were five to six persons informing them that they were police personnel, apprehended the second appellant whilst the first appellant claimed he cooperated with the police. F G

[20] The second appellant testified that on 15 February 2011, he came back from mosque after attending ceremony of 'Maulidur Rasul' and after the ceremony, he found there were many people gathered at the premise ('the homestay'). He went into the house to check what had happened but did not remember whether he had touched anything in the said house. H

[21] The second appellant later went out from the house and met with the first appellant who had planned to go fishing near the housing area of Taman Merdeka. The second appellant then decided to join the first appellant and go fishing. I

[22] The second appellant said when he went out from the car at a spot for fishing near the homestay, he saw one plastic bag containing two sim cards, keys and also identity card. He was attracted to the sim cards. He then tried to insert one of the sim cards into his hand phone and at that time the police came and arrested him and the first appellant.

DECISION OF THE LEARNED TRIAL JUDGE

[23] After scrutinising the defence in the light of the circumstantial evidence proffered by the prosecution, the learned trial judge came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The appellants' defence had failed to cast any reasonable doubt in the prosecution's case. Hence, the appellants were found guilty, convicted and sentenced to life imprisonment and ten strokes of whippings.

APPEAL

[24] Before us, the second appellant who represented himself submitted on his behalf and the first appellant adopted the said submission as his own. Reading from a lengthy written submission (encl 12), the second appellant submitted that the learned trial judge was wrong in convicting both of them for the following reasons:

(a) PW21 (the victim) did not identify the second appellant as the one who kidnapped and confined PW21;

(b) there was no ransom money recovered;

(c) the homestay where PW21 was confined was not registered under the second appellant's name;

(d) the van used to commit the crime was not registered in the second appellant's name;

(e) the telephone number used to contact the victim's family was not registered in the second appellant's name; and

(f) PW34 was threatened by the DPP and his (PW34) evidence should be rejected.

OUR DELIBERATION AND DECISION

[25] From the petition of appeal and the submissions by both the appellants, the appellants' case is that they have nothing to do with the kidnapping of PW21 and thus the learned trial judge erred in convicting them for the crime. Both of them submitted that since PW21 did not identify the second appellant as the one who kidnapped and confined PW21; there was no ransom money recovered; the homestay where PW21 was confined was not registered under

the second appellant's name; the van used to commit the crime was not registered in the second appellant's name; the telephone number used to contact the victim's family was not registered in the second appellant's name and PW34 was threatened by the DPP and his (PW34) evidence should be rejected; there are no evidence to prove that both the appellants were involved in kidnapping PW21.

[26] Reading the appeal record, we observed that the same line of arguments were submitted before the trial judge at the end of the prosecution's case which on appeal the previous panel of this court found there was no merit in the said submission and thus ordered the appellants to enter their defence. As such, we inclined to agree with the learned DPP who submitted, based on the authority of *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383, there is no necessity for us to reconsider the issues of prima facie case raised at the close of the prosecution's case and had been considered by the previous panel of this court, unless there are new evidence raised during the defence which could give rise to reasonable doubt in the prosecution's case. Therefore, we are of the considered view, the main issue in this appeal is whether the learned trial judge was justified and correct in his findings that the defence put forward by the appellants had not created any reasonable doubt in the prosecution's case and the prosecution on the other hand had proven its case beyond reasonable doubt.

[27] In assessing the defence by the first appellant, the learned trial judge wrote in his ground at pp 72–73 (Vol 1) appeal record as follows:

> 16 The learned counsel on behalf of the second accused submitted that PW12 could not identify the second accused accurately, and on the eventful day the second accused had stated that he was at a restaurant, Taman Melaka to wait for the first accused to go fishing.
>
> 17 This court found that the counsel for the second accused had failed to explain the rationale of claiming the identification made by PW12 against the second accused was inaccurate. Further, upon assessment of the fact of the case, this court accepted the evidence of PW12 who had met with the second accused face to face when the second accused came to submit the photostated copy of IC and driving licence (P39A) to PW12 and asked PW12 to enter into her record of renting the homestay based on the name as stated on the said IC copy.
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> 18 This court considered the evidence by the second accused and found it was merely a bare denial since his evidence was full of gaps and doubts. Firstly, the second accused stated that he did not have the phone numbers of the first accused, but how did they made appointment to go fishing on that day; secondly, the IC of Elias (PW9) was found in the house of the second accused but no explanation made; thirdly, this was the first time the second accused stated that he was with his mother (deceased) on last 14 February 2011 during the trial but this was not informed to the investigation officer; since the second accused had the opportunity until the year

2015 to tender this evidence whilst his mother was still alive and he failed to do so which is clearly an afterthought.

19 As such, this court decided the defence of the second accused is a bare denial and it is trite that the defence of bare denial is no defence because the second accused did not provide any explanation to the positive identification against him by PW12, the IC copy found in his house and the alibi statement together with his deceased mother on 14 February 2011 was only first disclosed in the trial but no mention any of it at the prosecution's stage. Reference is made to the case of *Mr Losali v Public Prosecutor* [2011] 4 MLJ 694 (CA).

[28] In assessing the defence by the second appellant, the learned trial judge did not rely on the DNA evidence which showed both the first and second appellants' DNA were found at cone No 13 because of possible contamination. Nevertheless, the learned trial judge wrote in his ground at para 9 pp 65–71 (Vol 1) appeal record:

9 Nevertheless, this court is mindful that whether the deciding factor to determine the link of the first accused with the kidnapping offence need not rest solely on result of the DNA profiling alone. (*Lim Hean Chong @ Teo Hean Chong v Public Prosecutor* [2012] 1 MLJ 149). So, it does not affect or weakened the case for prosecution due to absence of any evidence of forensic link in respect of the cone number '13'.

[29] At para 11, His Lordship wrote:

11 ... the sim card proffers evidence that links the first accused to the crime. It is in the evidence, there was a phone (P68) with two sim cards which were confiscated from the first accused ie No 017-7878739 and 017-3543499:

11.1 Considering the available evidences, there were two men appeared at the homestay on 14 February 2011 at around 2pm and one of them told PW12 that he had made the call to rent the homestay. He gave photostatted copy of IC and driving licence (P39A) to PW12 and asked PW12 to enter into her record of renting the homestay based on the name as stated on the said IC. In the circumstances, PW12 told this court that she was only able to identify second accused as the man who gave her the copy of P39A. After she received payment of RM140 from him, PW12 passed the key (P43) of the homestay to the second accused and on that night, PW12 received a call from someone using No 017-3543499 asking to continue renting the homestay for one more night.

[30] At para 11.3, His Lordship wrote:

11.3 On 15 February 2011 at around 9.20am, PW22 (brother of the victim) received calls from No 017-3543499 whilst he was at Hospital Besar Melaka which he had missed the first call. After being advised by a police officer, PW22 answered the second call from the said No 017-3543499 and the caller asked PW22 whether he was ready to give RM20,000. PW22 requested to talk to his brother for confirmation but the caller hung up; and

11.4 At around 11am, PW22 received another call from No 017-3543499 again whilst he was at his house and was ordered to prepare the ransom money. In relation to this number, it was registered in the name of one Mohd Elias bin Ahmad, who was called by prosecution as PW9; who had clarified that he had lost his IC on 22 January 2011 and he had lodged the necessary police report (P33).

[31] His Lordship then went on to find:

12 This court found that the second accused had rented the homestay from PW12 and called the PW12 later with No 017-3543499 asking for continue renting the place, as the second accused had been identified by PW12 as the person who rented the homestay using the name of 'Mohd Elias' as stated in the IC photocopy is shows that the second accused is a culprit involved in this case.

13 That evidence taken together with the evidence that the first accused knew the second accused had used this number to call PW12 for renting the homestay, and the first accused was present together with the second accused when arrested by the police near the homestay provided the circumstantial evidence they were involved together.

14 In the circumstances, the statement given by the first accused that, he suddenly saw a plastic bags containing, amongst others, including sim cards on the ground and then took and inserted one of the sim cards into his hand phone, was clearly an afterthought and his fabrications. This statement was devoid of reasonableness as the sim card number which came from nowhere was in fact had been used by the second accused; as well the two sim cards numbers were the numbers calling PW22 for ransom money before the time the first accused claimed he found the sim cards in the plastic bag on the ground at his fishing spot.

15 Pursuant to the above, this court is satisfied with the totality of all the evidence had provided a strong circumstantial evidence that the first accused was involved in the crime and his defence has not cast any doubt to the circumstantial evidence that points to his guilt.

[32] We had the opportunity to scrutinise the evidence of the witnesses recorded by the learned trial judge and compared them with that of the defence by both the appellants. With respect, we agree with the learned trial judge that the available evidence as adduced by the prosecution when taken together lead to only one irresistible conclusion that there was common intention amongst the appellants to commit the offence as charged. They had participated in concert pursuant to a pre arranged plan in the commission of the intended offence in furtherance of such common intention. When ordered to enter their defences, they merely deny any involvement in the kidnaping of PW21 and went on to fabricate a story alleging that on that day they went fishing and the second appellant suddenly saw a plastic bags containing the sim cards on the ground. From the factual matrix of this case, we have no reason to disagree with the learned trial judge who found the defence by the appellants were devoid of reasonableness as the sim card number which came from nowhere was in fact

had been used by the first appellant; as well the two sim cards numbers were the numbers calling PW22 for ransom money before the time the first accused claimed he found the sim cards in the plastic bag on the ground at his fishing spot. We agree with the learned trial judge who found both appellants failed to create any reasonable doubt in the prosecution case and the prosecution on the other hand had proven its case beyond reasonable doubt.

CONCLUSION

[33] As a conclusion, we find there was no merit in both the appellants' appeal. The conviction was safe and amply supported by strong circumstantial evidence which when taken together lead to only one irresistible conclusion that there was common intention amongst the appellants to commit the offence as charged. The defence by both the appellants was mere denial, which does not cast any reasonable doubt in the prosecution's case.

SENTENCE

[34] As for the sentence of life imprisonment instead of death penalty imposed by the learned trial judge, we find there was no necessity to interfere. We find life imprisonment imposed by the learned trial judge is reasonable based on the same reasons given by His Lordship ie there was no serious injuries inflicted on the victim, the length of his confinement period was short from the time he was abducted until he was rescued. The ransom money was also not paid out to the kidnappers. Apart from the degree of deliberateness in the commission of this offence, we also considered the mitigating factors and the public interests is best served by turning the appellants into leading an honest living after serving the sentence passed on them.

[35] For the above said reason, the appeals by both appellants was dismissed. The conviction and sentence imposed by the learned trial judge was affirmed.

Appeals dismissed; convictions and sentences affirmed.

Reported by Ashok Kumar